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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA
SECOND APPELLATE DISTRICT
DIVISION SIX

THE PEOPLE,

Plaintiff and Respondent,

v.

WILLIAM MORRIS,

Defendant and Appellant.

2d Crim. No. B202057
(Super. Ct. No. 2006011575)
(Ventura County)

William Morris appeals a judgment following conviction of burglary, with findings that he suffered a prior serious felony conviction and served a prior prison term. (Pen. Code, §§ 459, 667, subd. (a), 667, subds. (b)-(i), 1170.12, subds. (a)-(d), 667.5, subd. (b).)¹ We affirm.

FACTS AND PROCEDURAL HISTORY

Jodi Anderson and her two-year-old son shared a townhome in Ventura with Joseph St. Hilaire and his three-year-old son. In the late evening of March 25, 2006, Anderson left the townhome to socialize with friends; St. Hilaire remained at home with the two children.

As St. Hilaire used his computer in his bedroom, he heard noises in Anderson's bedroom. Suddenly, his bedroom door opened and an intruder, dressed in a

¹ All further statutory references are to the Penal Code.

dark-colored hooded shirt with white lettering, stood and looked at St. Hilaire. The intruder quickly closed the door, went downstairs, left through the patio door, and jumped over the patio wall. St. Hilaire looked through the bedroom window and saw the intruder drive away in a pickup truck. He telephoned Anderson and the police emergency dispatcher. As he spoke with the dispatcher, Morris, the driver of the pickup truck, returned to the street outside the townhome and parked the truck.

Within several minutes, police officers arrived and detained Morris, the only occupant of the pickup truck. He wore a dark-colored sweatshirt with white lettering and appeared to be under the influence of alcohol.

St. Hilaire did not know Morris and could not identify him as the intruder because he had "[b]arely" looked at him. Anderson returned home and spoke with police officers who showed her Morris's identification. She could not identify him from the identification card and was too frightened to look at him.

Police officers recovered marijuana, a glass marijuana pipe, lingerie, and a photograph depicting Anderson, her child, and her mother from the pickup truck. Anderson identified the photograph and the lingerie as belonging to her. She later recalled that she had met Morris previously in the company of a former boyfriend. She described him as "creepy" and having "a smirk" on his face.

Police officers took photographs of footprints found in a patio sandbox. Morris's shoes had mud and sand on the bottom. A forensic scientist from the Ventura County sheriff's department examined images of the bottom of Morris's shoes and compared them to images of the footprints in the sandbox and residence. She opined that Morris's shoes could have left the footprints.

At trial, Morris testified that he met a man named "Jason" that evening outside a bar. Jason wore a brown hooded sweatshirt. Morris and Jason smoked marijuana and then Jason decided to visit Anderson after receiving a telephone call from her. Morris knew Anderson because she had dated his friend. Morris then followed Jason to Anderson's nearby townhome.

From a distance, Morris followed Jason as he scaled a patio wall and entered an open patio door. Inside, Morris heard voices upstairs as he waited in the living room. Suddenly Jason ran down the stairs and left the residence. Morris followed, scaling the wall and running to his truck. He could not find Jason, and drove nearby looking for him. He then returned and parked his truck, "[b]ecause [he] was not sure what had just happened and [he] wanted to find out what was going on." He noticed clothing in the street, and a photograph next to the clothing. He recognized Anderson in the photograph and placed the clothing and photograph in his truck. Morris stated that he did not inform the police officers of Jason's involvement to protect Anderson from any problems with a former husband or boyfriend. He also testified that he has not seen Jason again.

The jury convicted Morris of burglary and found that a person other than the defendant or an accomplice was present during commission of the offense. (§§ 459, 667.5, subd. (c)(21).) In a separate proceeding, the trial court found that Morris suffered a prior serious felony conviction and served a prison term therefor. (§§ 667, subd. (a), 667, subds. (b)-(i), 1170.12, subds. (a)-(d), 667.5, subd. (b).) The trial court denied Morris's motion to strike the prior serious felony conviction pursuant to *People v. Superior Court (Romero)* (1996) 13 Cal.4th 497. It imposed a prison term of 17 years, consisting of an upper term of 6 years, doubled to 12 years, plus 5 years for the prior serious felony conviction. The trial court ordered victim restitution, and imposed a restitution fine and a parole revocation restitution fine, among other fines. (§§ 1202.4, subd. (b), 1202.45.) It struck the prior prison term allegation, and awarded Morris 77 days of presentence custody and conduct credits.

Morris appeals and contends that: 1) the trial court deprived him of a defense by its erroneous hearsay rulings; 2) the trial court erred by instructing with CALCRIM No. 300; 3) the trial court abused its discretion by imposing an upper term sentence; and 4) the trial court's use of the prior conviction violates *Cunningham v. California* (2007) 549 U.S. 270.

DISCUSSION

I.

Morris argues that the trial court's erroneous hearsay rulings deprived him of a fair trial. He points out that the trial court sustained the prosecutor's hearsay objections to statements that Jason made regarding his telephone conversation with Anderson. Morris asserts the statements were offered to explain his actions by following Jason into Anderson's home, and not for a hearsay purpose. (*People v. Hill* (1992) 3 Cal.4th 959, 987, overruled on other grounds by *Price v. Superior Court* (2001) 25 Cal.4th 1046, 1069, fn. 13 [extrajudicial statements explaining defendant's state of mind and conduct are not hearsay].) He adds that the court later recognized its error and allowed the testimony, but gave "unnecessary" limiting instructions. Morris argues that the repeated limiting instructions may have caused the jury to discredit Morris's testimony, thereby constituting prejudicial error. (See *People v. Mahoney* (1927) 201 Cal. 618, 627; *People v. Lyons* (1956) 47 Cal.2d 311, 322-323.)

Morris is correct that the trial court initially erred by sustaining hearsay objections to evidence of Jason's statements. The trial court researched the hearsay nature of the statements, however, and later reversed its rulings. Moreover, the prosecutor then withdrew hearsay objections to the testimony. Thus, Morris testified that Jason stated that he received a telephone call from Anderson who invited them to her residence, that he and Jason discussed whether "it was the Jodi [he] knew," and that Jason knew her address. Morris received a fair trial and was not precluded from explaining how he came to be inside Anderson's residence thereby establishing his purported defense.

Moreover, the trial court was correct in admonishing the jury not to consider Jason's hearsay statements for their truth, but only to establish Morris's intent and conduct. The admonitions were few and were not disparaging of defense counsel, unlike the decisions upon which Morris relies. (*People v. Mahoney, supra*, 201 Cal. 618, 627 [trial judge made discourteous and persistent disparaging remarks to defense counsel

and witnesses]; *People v. Lyons, supra*, 47 Cal.2d 311, 322 [trial judge wrote on instruction that jury should not be deterred from rendering guilty verdict].)

II.

Morris contends that the trial court erred by instructing with CALCRIM No. 300 ("All Available Evidence"). He asserts that the instruction improperly implies that the defense is required to produce some evidence. Morris argues that the trial court was required, sua sponte, to modify the instruction to add that the defense has no burden to call any witnesses. (*People v. Duncan* (1991) 53 Cal.3d 955, 969 [trial court must instruct upon general and relevant principles of law].) He points out that the prosecutor argued during summation that the defense offered no corroborating evidence of Jason's involvement in the charged crime.

CALCRIM No. 300 provides: "Neither side is required to call all witnesses who may have information about the case or to produce all physical evidence that might be relevant." Arguments similar to those raised here have been rejected in *People v. Anderson* (2007) 152 Cal.App.4th 919, 937-938, and *People v. Ibarra* (2007) 156 Cal.App.4th 1174, 1189-1190. We agree with the logic and reasoning of those decisions.

Moreover, once the defense presents evidence, it is subject to critical examination regarding failure to call logical witnesses, among other things. "[P]rosecutorial comment upon a defendant's failure 'to introduce material evidence or to call logical witnesses' is not improper." (*People v. Wash* (1993) 6 Cal.4th 215, 263.)

Finally, in reviewing a claim of instructional error, we consider whether there is a reasonable likelihood that the jury misconstrued or misapplied the law. (*People v. Kelly* (1992) 1 Cal.4th 495, 525.) The independent standard of review is applicable in assessing whether instructions correctly state the law. (*People v. Posey* (2004) 32 Cal.4th 193, 218.) Here the court instructed regarding the presumption of innocence and the prosecutor's burden of proof beyond a reasonable doubt. (CALCRIM No. 220.) We presume that jurors correlate and follow the court's instructions. (*People v. Ibarra, supra*, 156 Cal.App.4th 1174, 1190.) We do not find a reasonable likelihood that the jury

misunderstood the instruction as diluting the requirement that the prosecution prove its case beyond a reasonable doubt.

III.

Morris asserts that the trial court abused its discretion by imposing an upper-term sentence based upon his prior felony conviction of assault with a firearm. (§ 245, subd. (a)(2).) He points to the trial judge's comments that he considered only the prior conviction in selecting the upper term of imprisonment: "I am not considering any aggravating factors. I am only considering the prior conviction. And when you commit an offense as heinous as Mr. Morris' prior conviction, you only get one second chance, Mr. Morris, and you failed that miserably." (The prior felony conviction involved Morris firing an assault weapon into a residence occupied by a pregnant woman and her children. The woman sustained a gunshot wound. Police officers determined that 25-30 bullets struck the residence. Morris mistakenly believed the residence was occupied by others.) Morris contends that use of the prior conviction to enhance sentence and impose an upper term is improper. (*People v. Berry* (1981) 117 Cal.App.3d 184, 191 [two criminal convictions are not "numerous" within California Rules of Court, rule 4.421(b)(2), discussing aggravating circumstances].)

For several reasons, we reject Morris's argument.

First, Morris did not object to the trial court's use of the prior conviction as improper. He therefore has forfeited his claim on appeal. (*People v. Scott* (1994) 9 Cal.4th 331, 351-353; *People v. Steele* (2000) 83 Cal.App.4th 212, 226.) "[S]uch objection should have been made at the sentencing hearing, and the failure to do so waives the issue on appeal." (*Steele*, at p. 226.)

Moreover, absent the court's reliance upon the prior conviction, there is no reasonable probability that Morris would have obtained a more favorable sentence. (*People v. Osband* (1996) 13 Cal.4th 622, 728 [improper dual use of sentencing factor harmless error if it is not reasonably probable that court would impose more favorable sentence absent the error].) The probation report discusses other aggravating factors and states that there are no mitigating factors. The report also states that Morris suffered two

convictions for driving under the influence of alcohol, committed during his parole from the prior felony conviction. The trial court stated that Morris "failed . . . miserably" at a second chance following his prior conviction and that the court was offended that he "portray[ed] [himself] as a victim" at sentencing. (*People v. Bravot* (1986) 183 Cal.App.3d 93, 98 [given the trial court's remarks, it was a virtual certainty that defendant would not obtain a more favorable sentence upon remand].)

IV.

Morris argues that the trial court's dual use of the prior conviction violates *Cunningham v. California*, *supra*, 549 U.S. 270. He asserts that the prior conviction became an element of the offense to which he is entitled to a jury trial. Morris adds that the trial court engaged in unconstitutional fact-finding when it described the prior conviction as "heinous" and concluded that he did not perform satisfactorily on parole. He also challenges *People v. Sandoval* (2007) 41 Cal.4th 825 as wrongly decided.

Cunningham v. California, *supra*, 549 U.S. 270, 288-289, held that other than the fact of a prior conviction, any fact that increases the penalty for a crime beyond the statutory maximum must be tried to a jury and proved beyond a reasonable doubt. The constitutional right to a jury trial and proof beyond a reasonable doubt regarding aggravating factors does not extend, however, to the circumstance that a defendant's record of prior convictions committed while on probation or parole establishes unsatisfactory performance on probation or parole. (*People v. Towne* (2008) 44 Cal.4th 63, 82.) Only one valid aggravating factor is required to render a defendant eligible for an upper term of imprisonment. (*People v. Black* (2007) 41 Cal.4th 799, 813, 815-816.)

Here the trial court stated during sentencing that Morris "failed . . . miserably" in a second chance following his prior conviction. The probation report reveals that he was convicted of driving under the influence of alcohol on two occasions while on parole. He also received a grant of probation for the first alcohol-related conviction, and violated that grant by his conviction of a second alcohol-related offense. Imposition of the upper term was constitutionally permissible. (*People v. Towne*, *supra*, 44 Cal.4th 63, 70-71.)

Moreover, the trial court sentenced Morris following the amendments to section 1170, subdivision (b), allowing a sentencing court to exercise its discretion to select among three terms without making any factual finding. (*People v. Wilson* (2008) 164 Cal.App.4th 988, 991-992.) Our Supreme Court has judicially reformed the former sentencing law to conform to the amended statute. (*People v. Sandoval, supra*, 41 Cal.4th 825, 845, 847.) Thus, the sentencing law that applied to Morris has not been found to offend constitutional precepts. (*Ibid.*; see *Auto Equity Sales, Inc. v. Superior Court* (1962) 57 Cal.2d 450, 455.)

The judgment is affirmed.

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GILBERT, P.J.

We concur:

YEGAN, J.

COFFEE, J.

Glen M. Reiser, Judge
Superior Court County of Ventura

Linda C. Rush, under appointment by the Court of Appeal, for Defendant and Appellant.

Edmund G. Brown, Jr., Attorney General, Dane R. Gillette, Chief Assistant Attorney General, Pamela C. Hamanaka, Senior Assistant Attorney General, Susan D. Martynec, Supervising Deputy Attorney General, Lawrence M. Daniels, Robert S. Henry, Deputy Attorneys General, for Plaintiff and Respondent.